Supreme Court, U.S.
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No. 99-1527

IN THE

Supreme Court of the United States

JUDY WOODWARD, individually, and as the Bernalillo County Clerk and the BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BERNALILLO,

Petitioners,

v.

ELIZABETH PERRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Comes now the Respondent, Elizabeth Perry, by and through her attorney, Steven K. Sanders, and in accordance with Rule 15 of the Rules of the Supreme Court of the United States replies to the Petition for Writ of Certiorari as follows:

I. REPLY TO STATEMENT OF CASE.

Petitioners' summary of facts concerning the reasons for Perry's termination (pages 5-6 of Petition) is not part of the record before the District Court nor the Tenth Circuit Court of Appeals. Appendix E (pp. 72-76) was not part of the record and should not be relied upon in making any determination of fact.

Petitioners have, however, failed to set out an important fact presented by Respondent to the District Court and to the Tenth Circuit Court of Appeals as follows:

> When an EEOC claim for race discrimination was made by an African American employee against Woodward, she hired an African American as a receptionist and then bragged, "They can't accuse me of being a racist because I have a Black working for me."

(Aplt. App. p. 034, para. 18).

II. REPLY TO CLAIM THAT EMPLOYMENT "AT-WILL" IS EMPLOYMENT WITHOUT A CONTRACT UNDER NEW MEXICO LAW.

Petitioners' claim that an at-will public employee works without a contract of employment ignores established New Mexico law. An "at-will" public employee does have a contract of employment; however, one term of the contract is that it may be terminated at-will. *See, e.g., Garcia v. Middle Rio Grande Conservancy Dist.*, 918 P.2d 7, 121 N.M. 728, (N.M. 1996):

> Nevertheless, in New Mexico **an employment contract is for an indefinite period and is terminable at the will of either party** unless there is a contract stating otherwise. Hartbarger, 115 N.M. at 668, 857 P.2d at 779.

Excerpt from page 918 P.2d 10.

Petitioners' argument that termination of at-will employment does not violate 42 U.S.C. § 1981(b) ignores its specific language which states, "The term 'make and enforce contracts' includes the making, performance, modification and **termination** of contracts, and the enjoyment of **all** benefits, privileges, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Finally, the claim that a body of "federal contract law" will be created by the Tenth Circuit's decision is nonsense. It is not the terms of a contract that are relevant to a Section 1981 claim; what is relevant is whether there is a contract and whether that contract was terminated for discriminatory reasons.

III. REPLY TO CLAIM THAT PERRY CANNOT ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION BECAUSE A PERSON OF THE SAME PROTECTED STATUS REPLACED PERRY.

A. *McDonnell Douglas* is not an inflexible formula.

The argument that one must be replaced by one outside the protected class was rejected in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996): "**Because it lacks probative value**, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case." 116 U.S. at 1312.

> In our view, however, the proper solution to the problem lies not in making an utterly irrelevant factor

> an element of the *prima facie* case, but rather in recognizing that the *prima facie case*, requires *"evidence adequate to create an inference than an employment decision was based on a[n] [illegal] discriminatory criterion . . ."*

517 U.S. at 312.

The *O'Connor* decision reaffirms the decision in *Teamsters v. United States*, 431 U.S. 324 (1977). *Teamsters* makes it clear that *McDonnell Douglas* did not create an inflexible approach to making a prima facie case as Petitioners would have this Court declare, but that the facts supporting discrimination need to be examined in each case:

> The company and union seize upon the *McDonnell Douglas* pattern as the only means of establishing a prima facie case of individual discrimination. **Our decision in that case, however, did not purport to create an inflexible formulation. We expressly noted that [t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.** Id. at 802 n. 13. **The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required,** but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

431 U.S. at 358. (Emphasis added).

In the case at bar, the person hired to replace Perry was already a member of the Clerk's office. Therefore, any inference

that might be made in favor of Petitioners is minimal. Additionally, Woodward previously bragged that she could not be sued for discrimination by an African American employee since she had hired another African American. Thus, Woodward has previously used this excuse to hide her discriminatory actions. According to 3 Matthew Bender, *Employment Discrimination*, § 8.08(2), p. 8-129, "an employer might have replaced the plaintiff with another of the same race or sex as 'damage control' for an existing or threatened lawsuit."

Petitioners' argument makes as much sense as the argument rejected in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) that an employer will not discriminate against a member of his own race or sex. Petitioners' inflexible approach has not and should not become the law.

B. The New Mexico Supreme Court also recognizes that *McDonnell Douglas* is not intended to be an inflexible formula.

The New Mexico Supreme Court has also rejected a mechanistic approach to the establishment of a prima facie case for a claim under the New Mexico Human Rights Act, 28-1-1 *et seq.*, N.M.S.A. 1978 (1996 Repl.). Thus, in *Smith v. FDC Corp.*, 787 P.2d 433, 109 N.M. 514 (S. Ct. 1990) the Court expressly rejected the idea that a plaintiff must prove replacement by someone outside the protected group:

> A prima facie case of discrimination may be made out by showing that the plaintiff is a member of the protected group, that he was qualified to continue in his position, that his employment was terminated, and that his position was filled by someone not a member of the protected class. *Hawkins v. EEOC Corp.*, 883 F.2d 977, 982 (11th Cir. 1989); *Haskell v. Kaman Corp.*, 743 F.2d 113, 119 n.1 (2d Cir. 1984).3 **A prima facie case may also be made out**

> **through other means; not all factual situations will fit into any one type of analysis, although unlawful discrimination may nevertheless be present. For example, a prima facie case can be shown absent a demonstration that the plaintiff was replaced by someone not in the protected class if he can show that he was** dismissed purportedly for misconduct nearly identical to that engaged **in by one outside of the protected class who was nonetheless retained.** *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282-84, 96 S. Ct. 2574, 2579-81, 49 L. Ed. 2d 493 (1976); *Nix v. WLCY Radio/Rahall Communica*tions, 738 F.2d 1181, 1185-86 (11th Cir. 1984).

Excerpt from 787 P.2d at 437. (Emphasis added).

Hence, both this Court and the Supreme Court of New Mexico have rejected a mechanistic formula to proving discrimination. Petitioners' invitation to the creation of such a formula should be rejected.

IV. CONCLUSION.

Perry prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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